UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

UPS SUPPLY CHAIN SOLUTIONS, INC.

and Case 12-CA-113671

INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, LOCAL UNION NO. 769

COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

/s/ *Marinelly Maldonado*

Marinelly Maldonado
Counsel for the General Counsel
National Labor Relations Board
Miami Resident Office, Region 12
51 S.W. 1st Avenue, Suite 1320
Miami, FL 33130
marinelly.maldonado@nlrb.gov

Pursuant to Section 102.46 of the Board's Rules and Regulations, Counsel for the General Counsel (herein called the General Counsel) files the following Answering Brief to Respondent's Exceptions to Administrative Law Judge's Decision.[1]

I. STATEMENT OF THE CASE

On January 31, 2015, upon a charge filed by International Brotherhood of Teamsters, Local Union No. 769 (the Union), a complaint issued alleging that Respondent UPS Supply Chain Solutions, Inc. has been engaging in unfair labor practices in violation of Section 8(a)(1) and (5) of the Act. [GCX 1(a), GCX 1(d), paragraphs 6(a) through 6(d) and 7]. On September 12, 2014 and October 14, 2014, a hearing concerning this matter was held before the Honorable Ira Sandron, Administrative Law Judge (herein called the "ALJ"). On November 28, 2014, the ALJ issued his Decision finding that Respondent violated Section 8(a)(1) and (5) of the Act by announcing and implementing changes in health insurance benefits without affording the Union prior notice and an opportunity to bargain. (ALJD 6:33-36). The ALJ also provided for a remedy, Recommended Board Order, and Notice to Employees to remedy those violations of the Act. (ALJD 6:40 to 7:5; Appendix). On January 9, 2015, Respondent filed its Exceptions and Brief in Support of Exceptions. General Counsel is separately filing a single Cross-Exception and Brief in Support Thereof.

II. STATEMENT OF FACTS

Respondent is a business unit or subsidiary of United Parcel Service (UPS), and it is engaged in the business of providing transportation and freight services. [ALJD 2:25-29; GCX 1(d), paragraph 2(a); GCX 1(h), paragraph 2(a); Tr. 147-148, Dorfman]. On April 29, 2014, the

[1] The ALJ's Decision will be identified by "ALJD," page, and line. Respondent's Exceptions will be identified by "RE" and the number of the exception, and Respondent's Brief in Support of Exceptions will be identified by "RB" and the page number. Transcript pages will be identified by the page, line, and name of the witness, where necessary for clarification. "GCX" refers to the General Counsel's exhibits, and "RX" refers to Respondent's Exhibits.

Board certified the Union as the exclusive collective-bargaining representative in the following collective-bargaining unit:

> All regular full-time and part-time warehouse operations employees employed in the following job classifications: warehouse II and III; senior warehouse; inventory control representatives; inventory control associates II; customer support representatives I; customer support representatives II; order processing representatives II and III; customer care representatives III; and administrative assistant II employed at Respondent's facility located at 3450 NW 115th Avenue in Doral, Florida, excluding all other employees including guards and supervisors as defined in the Act.

[ALJD 2:31-40; GCX 1(d), paragraphs 5(a) to 5(c); GCX 1(h), paragraphs 5(a) to 5(c)].

Since at least 2004, and as of the time of certification of the Union as the exclusive representative of the Doral warehouse operations employees, UPS and its business units and subsidiaries, including Respondent, have provided health benefits coverage to their approximately 75,000 unrepresented employees, including, approximately 10,000 UPS Supply Chain Solutions employees, including the approximately 41 Doral warehouse operations employees, in annual versions of the UPS Flexible Benefits Plan. (ALJD 2:42 to ALJD 3:11; Tr. 147-149, 154-156, 168; RX 4 to 14). UPS is the plan administrator of the UPS Flexible Benefits Plan. (RX 3, pg. 139).

The parties began collective-bargaining negotiations in about May 2013, and have met for negotiations about twice a month, but have not reached agreement. (ALJD 4:4-5; Tr. 37:2-5, Nuñez; tr. 82-83, Valero; Tr. 192, Rodriguez). Business Agent Eduardo Valero has represented the Union at these meetings, as its chief spokesperson, along with bargaining unit employee Juan Nuñez. (ALJD 4:7-8; Tr. 35, 38, Nuñez; Tr. 82, Valero).

Respondent has been represented by its counsel and chief spokesperson Erik Rodriguez, managers Bernard Tichenor and Tom O'Malley, and representative Darren Jones. (Tr. 90-93, Valero; Tr. 193-194, Rodriguez).

From August 26 to August 30, 2013, Respondent held a series of meetings for groups of unit employees and announced significant changes to their health benefits that were to take effect on January 1, 2014. [ALJD 3:33-37; Tr. 39:19 to 42:13-10, Nuñez, Tr. 203-205, stipulation; GCX 3; GCX 4]. At the group meeting attended by Juan Nuñez, Human Resources Supervisor Belkis Cruz announced that if an employee's spouse had health insurance through the spouse's employer, the spouse must be removed from Respondent's health insurance plan; that if the employee smokes, he or she would be charged a $150 premium; that employees would be required to provide information on a website about whether or not their spouse had health coverage and whether or not they smoked; that the changes in health insurance coverage would take effect in January 2014; and that employees would have to enroll for health insurance in October 2013 for 2014. [Tr. 49-55, Nuñez, GCX 5].

Nuñez reported to Union Business Agent Valero what he learned at the meeting he attended. Valero later met with a group of unit employees on September 15, 2013, and they confirmed what Nuñez had told him. (ALJD 3:39-40; Tr. 55:14-56:4, Nuñez; Tr. 83:10-84:14, Valero). Respondent had not informed the Union about the 2014 health benefits changes regarding spousal enrollment and employee tobacco use before announcing them to the employees. Union agent Valero did not learn about the 2014 health plan changes until the employees told him, following the announcement to employees. (ALJD 3:40-41; Tr. 57, Nuñez; Tr. 83-84, 87-88, 90-91, Valero).

Respondent admits that it did not notify the Union of the changes to be made in 2014. (ALJD 3:40-41; Tr. 89 - admission by Respondent counsel Sulds).

Respondent and the Union representatives met on September 21, 2013, for a bargaining session. (ALJD 4:19-31). The meeting was attended by Union Business Agent Valero,

employee Nuñez, Respondent counsel Rodriguez, Respondent managers Tom O'Malley and Bernard Tichenor, and Respondent representative Darren Jones. (Tr. 60-62, Nuñez; Tr. 90-93, Valero; Tr. 193-194, Rodriguez; GCX 2, p.2). Valero raised the subject of the health benefits changes that Respondent had announced to employees and told Rodriguez that it had been brought to his attention that Respondent had a meeting with employees and wanted to make changes in health insurance by removing the spouse of an employee from coverage if the spouse worked for an employer that offered health insurance, and by charging employees who smoke $150 per month. Valero also told Rodriguez that nobody (i.e. in management) had brought that (information) to the Union, and that he wanted to discuss those changes in negotiations. Respondent's negotiators then asked for a caucus and caucused for 15 or 20 minutes. Then Rodriguez informed Valero that Respondent did not need to negotiate about the changes to the health plan because Respondent had a history of making modifications to the health plan almost every year, and asserted that the 2014 changes represented a continuation of the status quo. (ALJD 4:23-31). Valero said that he would file charges with the Board. (Tr. 57-63, 68-69, Nuñez; Tr. 93-95, 104-105, Valero).

From October 14 to November 1, 2013, Respondent proceeded to enroll unit employees in its 2014 health insurance plan, notwithstanding that it had refused to negotiate the changes with the Union. (GCX 6; GCX 7; GCX 8, GCX 10). On January 1, 2014, Respondent implemented the health benefits changes that it had announced to the unit employees in late August 2013. (ALJD 4:33-35; Tr. 165:1-9, Dorfman; GCX 9).

III. ARGUMENT

A. The ALJ correctly found and concluded that by giving the Union Summaries of Material Modifications in health benefits for earlier years, Respondent did not put the Union on notice regarding the health benefits changes that were announced to employees in August 2013 and implemented on January 1, 2014. Respondent's Exceptions 1, 3, 4, 8, 12, 17, and 19 should be denied.

On May 10, 2013, the Union and Respondent representatives met for a bargaining session. During this meeting, the Union was given benefit information, which consisted of various two inch binders. There was little discussion or explanation about the information provided to the Union. Respondent negotiator Bernard Tichenor (BT) told the Union that he would not go through the information provided page by page. (Tr. 182:11-185:8, Schaffer; RX 3; RX 15, p. 11). Neither Respondent attorney Jenny Schaffer nor any other witness testified as to what was said at the May 10 meeting.

Respondent contends that it was not obligated to give the Union notice of the 2014 changes because during the May 10 meeting it provided the Union with a pre-2014 Summary Plan Description that contained a statement reserving Respondent's right to make future changes and Summaries of Material Modifications (SMMs) from previous years. (Tr. 89). However, there is no evidence that before September 21, 2013, Respondent told the Union that it had the right to make unilateral changes to the Flexible Benefits Plan. Moreover, the prior changes in health benefits all preceded the certification of the Union, and, as discussed below in Point D, did not establish a status quo that the Employer was obligated or permitted to continue without first negotiating. In addition, the fact that there were a disparate series of past changes to health benefits does not establish the right to make different changes of an unprecedented nature in 2014 with respect to the charging of premiums to tobacco users and the elimination of the right of employees to coverage for their employed spouses who have the option of obtaining health

insurance through their own employers. *Caterpillar, Inc.*, 355 NLRB 521, 523 (2010). The 2014 changes were unique, and there is not even a showing that the prior changes were similar to each other. In these circumstances, the 2014 health benefits changes would have altered the status quo and Respondent would have been required to give the Union notice and an opportunity to bargain even if the Union had been the bargaining agent during the prior changes – which it was not.

The ALJ properly found that Respondent did not provide the Union with notice of the 2014 changes when, in May 2013, it furnished the Union with information showing pre-2014 changes in health insurance benefits. (ALJD 5:41 to 6:2). To be adequate, prior notice must afford a union with a reasonable opportunity to evaluate the employer's proposal properly and to present counter proposals before any implementation or change. *Gannett Co.*, 333 NLRB 355, 357-358 (2001). As the ALJ properly found, the Union had no way to know what, if any, changes Respondent contemplated for 2014. There is no evidence that Respondent had even determined the changes that were to be made in 2014 as of May 2013. Therefore, the Union could not have been expected to negotiate in a vacuum when it had no idea what the specific changes would be. (ALJD 5:45-6:1-2).

In Exceptions 1 and 4 Respondent points out that SMMs were issued in months other than September or October on occasion. Even if that is true, it does not establish that Respondent gave the Union notice of the 2014 changes before they were announced to the unit employees, while the parties were in the midst of negotiations for a first collective-bargaining agreement. Moreover, Respondent's acknowledgement in Exception 1 that in some past years changes in health benefits were issued on dates other than January 1, undercuts its otherwise

flawed argument that the January 1, 2014 health benefit changes were an annual recurring event that represented a continuation of the status quo.

The ALJ's finding and conclusion that Respondent did not give the Union notice of the 2014 changes in May 2013 and that Respondent's provision of the past SMMs to the Union did not constitute proper notice of the changes to take place in 2014 should be affirmed and Respondent's Exceptions 1, 3, 4, 8, 12, 17, and 19 should be denied.[2]

B. The ALJ correctly found and concluded that the July 23, 2013 agreement between the Union and Respondent that they would bargain about economic items after non-economic items were fully agreed upon did not relieve Respondent of its obligation to notify and bargain with the Union about the 2014 health benefits changes. Respondent's Exceptions 6, 7, 9, and 20 should be denied.

The ALJ correctly found that the parties' July 23, 2013, informal, unwritten agreement to bargain about non-economic items before bargaining about economic items, was not a waiver of the Union's right to bargain over health insurance benefit changes effective January 1, 2014. (ALJD 6:4-15). A waiver of a right to bargain must be clear and unmistakable. *Allison Corporation*, 330 NLRB 1363, 1365 (2000); *Lear Siegler, Inc.*, 293 NLRB 446, 447 (1989). The Union did not waive its right to bargain over the health insurance changes.

The July 23, 2013, verbal agreement to negotiate non-economics first was not an agreement to **resolve** all non-economic issues before negotiating regarding any economic issues, as Respondent asserts. In this regard, it is well-established Board law that an employer may not condition bargaining over economic issues upon resolution of all noneconomic issues. *Erie Brush & Manufacturing Corporation*, 357 NLRB No. 46, slip op. at 1-2, 11 (2011); *John Wanamaker Philadelphia*, 279 NLRB 1034, 1034-1035 (1986). Such conduct by an employer or union is construed as creating a "procedural straight jacket," which is incompatible with the statutory duty to negotiate in a manner which facilitates agreement. *Pillowtex Corporation.*, 241

[2] Respondent's Exception 2 is inconsequential.

NLRB 40, 47 (1979), enfd. 615 F.2d 917 (5th Cir. 1980); *NLRB v. Patent Trader, Inc.*, 415 F.2d 190, 198 (2nd Cir. 1969); *Yama Woodcraft, Inc., d/b/a Cal-Pacific Furniture Mfg. Co.*, 228 NLRB 1337, 1342 (1977).

Moreover, the parties' agreement to negotiate about non-economics first did not permit Respondent to announce or make changes in economic terms of employment, such as health benefits, without giving the Union notice or an opportunity to bargain, particularly because at the time the Union agreed to discuss non-economics first it was unaware of the 2014 health benefits changes. In the context of negotiations for a first collective-bargaining agreement, the Union obviously did not contemplate that the Employer would be permitted to unilaterally implement changes in economic terms while the parties were negotiating about non-economic terms. If any party breached an agreement to negotiate about non-economics first, it was the Employer, who injected the change in economic terms, unlawfully and without bargaining.

When the Union found out about the changes and complained of the unilateral announcement of the changes to the unit employees, the Employer replied that it did not have to bargain about the changes. Thus, the Employer treated the implementation of the unilaterally announced changes as a fait accompli by asserting its right to make the changes unilaterally, and it was futile for the Union to pursue the matter further, other than by filing and pursuing the unfair labor practice charge herein. For these reasons, the ALJ's finding and conclusion that the July 23 agreement did not constitute a waiver of the Union's right to bargain over the health benefits changes should be affirmed and Respondent's Exceptions 6, 7, 9, and 20 should be denied.

C. The ALJ properly found and concluded that the Union requested to bargain over the 2014 health benefits changes during the September 21, 2013 bargaining session and that Respondent refused to bargain. Respondent's Exceptions 5, 13, 14, 16, and 18 should be denied.

As noted above, on September 21, 2013, Union Business Agent Eduardo Valero and employee Juan Nuñez met with Respondent counsel Erik Rodriguez, Respondent Managers Tom O'Malley and Bernard Tichenor, and Respondent representative Darren Jones for a bargaining session. (Tr. 60-62, Nuñez; Tr. 90-93, Valero; Tr. 193-194, Rodriguez; GCX 2, p.2). Valero raised the subject of the health benefits changes that Respondent announced to the bargaining unit employees. Valero told Rodriguez that it had been brought to his attention that Respondent had meetings with employees and wanted to make changes in health insurance by removing the spouse of an employee from coverage if the spouse worked for an employer that offered health insurance, and by charging employees who smoke $150 per month. Valero also told Rodriguez that nobody had informed the Union, and that he wanted to discuss those changes in negotiations. After Respondent's negotiators caucused, Rodriguez informed Valero that Respondent did not need to negotiate about the changes to the health plan. Valero then said that he would file charges with the Board. (Tr. 57-63, 68-69, Nuñez; Tr. 93-95, 104-105, Valero).

Respondent relies on a claimed inconsistency between Valero's testimony at the hearing and his affidavit as to Rodriguez's specific refusal to negotiate. However, as the ALJ properly found at the hearing, the two versions are essentially consistent. (Tr. 108-109). In the affidavit given on October 29, 2013, Valero stated that Rodriguez told him that "they believed they have the right to do it," in response to Valero's complaint that Respondent had made health benefits changes without notifying the Union. At the trial, Valero's testimony was consistent with his affidavit testimony. In slightly different versions, Rodriguez's message to Valero was clearly that Respondent believed that it had no obligation to bargain with the Union about the changes.

In any event, the ALJ credited Rodriguez's fuller account of his response to Valero's complaint that Respondent had announced the changed health benefits to unit employees without bargaining. Thus, the ALJ found that Rodriguez told Valero that Respondent did not have to bargain over the changes because it had a long history of modifying the health plan, almost every year; and therefore the upcoming (2014) changes represented a continuation of the status quo. (ALJD 4:28-31). As noted above, any further request by the Union to bargain about the changes would have been futile.

Respondent also urges that Valero's testimony be discredited because Valero testified that he told Rodriguez on September 21, 2013 that he would file a charge regarding the refusal to bargain, when, in fact, he had already filed the charge two days earlier. However, Valero logically explained that what he meant at the meeting when he told Rodriguez that he would file a charge was, in effect, that the Union would continue to pursue the charge because Respondent had not agreed to negotiate. (Tr. 95, 102-103).

The ALJ properly found that Rodriguez did not rebut Valero's testimony that Rodriguez informed Valero that Respondent was not obligated to bargain with the Union over the health benefits changes. The ALJ properly credited Valero that he requested to bargain over the health benefits changes, as evidenced by the fact that following Valero's bargaining request, Respondent's bargaining team asked to caucus and returned with Rodriguez's aforementioned response to the Union's request for bargaining. (ALJD 4:23-26).

The Board's established policy is not to overrule an ALJ's credibility resolutions unless the clear preponderance of all the relevant evidence convinces the Board that they are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950). Respondent did not present any argument in its brief establishing a basis for reversing the ALJ's credibility resolution with

respect to the Union's demand to bargain and Respondent's response. It is supported by substantial record evidence, and the ALJ's careful analysis of all the evidence, including, but not limited to, his careful observation of the demeanor of witnesses as they testified. Therefore, the Board should affirm the ALJ's credibility resolution with respect to the Union's demand to bargain over the health benefits changes and Respondent's refusal.

Despite Respondent's failure to notify the Union of the 2014 changes, prior to announcing the changes to the bargaining unit employees, once the Union learned about the changes, it demanded the opportunity to bargain over those changes. Not only did the Union request to bargain over the health benefits changes, the filing of the unfair labor practice charge informed Respondent that the Union wanted to bargain over the health insurance changes. Respondent refused and proceeded to unilaterally implement the changes on January 1, 2014. Therefore the ALJ's finding and conclusion that the Union requested bargaining over the health insurance changes should be affirmed and Respondent's Exceptions 5, 13, 14, 16, and 18 should be denied.

D. The ALJ correctly found and concluded that Respondent announced and implemented changes in health insurance benefits without affording the Union prior notice and an opportunity to bargain, in violation of Section 8(a)(1) and (5) of the Act. Respondent's Exceptions 3, 5, 6, 7, 8, 10, 11, 12, 13, 14, 16, 17, 18, 19, 21, 22, 23, 24, 25, 26, 29, 30, 31, 32, and 33 should be denied.

Unilateral actions by an employer that modify terms or conditions of employment of bargaining unit employees constitute a per se violation of Section 8(a)(5) of the Act. Such actions allow for an inference of subjective bad faith. *NLRB v. Katz*, 369 U.S. 736 (1962). As the ALJ properly found, health insurance benefits are mandatory subjects of collective bargaining. (ALJD 4:39-42). At a minimum, an employer is obligated to maintain the status quo

ante and bargain in good faith until impasse is reached. *Daily News of Los Angeles*, 315 NLRB 1236 (1994).

Respondent's announcement and implementation of changes to its health insurance plan benefits, including the removal of spousal coverage for certain employees and premiums charged to employees who use tobacco, are precisely the types of discretionary and significant changes in terms and conditions of employment over which employers are obligated to give unions prior notice and an opportunity to bargain.

Where a union has just been certified, the continuation of past practices in effect prior to the certification does not relieve an employer of its obligation to bargain with the certified union about subsequent implementation of those practices that involve changes in wages, hours, and other terms and conditions of employment. *Mackie Automotive Systems*, 336 NLRB 347, 349 (2001), and cases cited therein (an employer's past practices regarding pay and hours of work before the certification of a union do not relieve the employer obligation to bargain about post-certification implementation of those practices that entail changes in terms and conditions of employment); *Washoe Medical Center, Inc.*, 337 NLRB 202 (2001) [continuation of setting of wage rates for newly hired employees after the election of a union representative without giving the union notice and an opportunity to bargain violates Section 8(a)(5)]; *Adair Standish Corporation.*, 292 NLRB 890, fn. 1 (1989), enfd. in relevant part 912 F.2d 854 (6th Cir. 1990) (despite past practice of economic layoffs, because of the newly certified union the employer could no longer unilaterally exercise its discretion regarding layoffs); *Oneita Knitting Mills, Inc.*, 205 NLRB 500, fn. 1 (1973) (an employer with a past history of a merit wage increase program may no longer unilaterally exercise its discretion with respect to the amounts or timing of wage increases once an exclusive bargaining agent is selected; rather those are matters that must be

bargained). Even if the changes themselves were considered reasonable, an employer is prohibited from making changes to wages, hours, or terms and conditions of employment without affording the certified representative an opportunity to bargain. *Flambeau Airmold Corporation*, 334 NLRB 165 (2001). Thus, the pre-2014 health benefit changes should not be considered as a past practice, or as the status quo, because they were made before the Union became the bargaining agent for the unit employees.

Respondent did not notify the Union of the changes to the health insurance scheduled to take effect on January 1, 2014 before announcing the changes to employees, and then asserted its right to unilaterally implement the changes in response to the Union's post-announcement request to bargain, and finally unilaterally implemented the changes. Respondent claims that it had no duty to notify or bargain with the Union about those changes because of its past practice of making changes to health insurance benefits in most of the recent years, and the general information it provided to the Union at the beginning of bargaining.

The changes in the UPS Flexible Benefits Plan applicable to Respondent's employees were entirely within the control and discretion of UPS. Respondent may have been able to lawfully change the unit employees' health insurance benefits notwithstanding the lack of a good-faith impasse on an overall collective-bargaining agreement, if it had established that such changes are an annually occurring discrete event that occurred during overall contract negotiations, but only after giving the Union notice and an opportunity to bargain in good faith regarding the health benefits changes. *St. Mary's Hospital of Blue Springs*, 346 NLRB 776 (2006), citing *Stone Container Corporation*, 313 NLRB 336 (1993). Respondent gave no notice or opportunity to bargain to the Union, and therefore even if the changes in health benefits were considered an annually occurring discrete event that could be bargained separately from the

overall collective-bargaining negotiations, Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally announcing the health benefits changes to unit employees and unilaterally implementing those changes. *Brannan Sand & Gravel Company*, 314 NLRB 282 (1994); cf. *St. Mary's Hospital of Blue Springs*, 346 NLRB 776 (2006); *Saint-Gobain Abrasives, Inc.*, 343 NLRB 542 (2004); *Nabors Alaska Drilling, Inc.*, 341 NLRB 610,614 (2004) (the Board found no violation of the Act in the latter three cases, which are clearly distinguishable from the instant case because the employer in each of those cases did not act unilaterally, but instead gave timely notice and an opportunity to bargain to the union regarding annual changes in health benefits and the parties reached a valid impasse on the discrete health benefits issue before implementing the changes).

At the time that Respondent announced the changes to the employees in late August 2013, contract negotiations were ongoing and the annual changes in health benefits did not need to be implemented for another four months. That could have been sufficient time to negotiate in good faith about health benefits, and could also have been sufficient time to reach a complete collective-bargaining agreement or a good-faith impasse in overall contract negotiations.

Respondent's announcement of the 2014 health benefits changes to unit employees in late August 2013, violated Section 8(a)(1) and (5) of the Act because Respondent took it upon itself to set an important term and condition of employment. This action suggests the irrelevance of the Union as the employees' bargaining representative. *Kurdziel Iron of Wasueon, Inc.*, 327 NLRB 155, 155-156 (1998), enfd. 208 F.3d 214 (6th Cir. 2000); *ABC Automotive Products Corp.*, 307 NLRB 248, 250 (1992), enfd. 986 F.2d 500 (2nd Cir. 1992). In addition, the fact that only three of the approximately 40 unit employees may have been affected by the health benefits changes, as Respondent asserts, does not render the changes inconsequential or insubstantial.

Caterpillar, Inc., 355 NLRB at 523, fn. 17, and cases cited therein. The changes were significant for the employees affected by them and could potentially affect other unit employees in the future.

Respondent continues to improperly rely on *The Courier-Journal*, 342 NLRB 1093 (2004), where the union and employer had an established collective-bargaining relationship and the union agreed to a practice of charging unit employees the same health insurance premiums as non-unit employees were charged, as the ALJ correctly reasoned. Thus, in *The Courier-Journal* the Board distinguished a case more like the instant case, in which a new union was not bound by a prior union's acquiescence to an employer practice. *Eugene Iovine, Inc*., 328 NLRB 294 (1999), enfd. 1 Fed Appx. 8 (2d Cir. 2001). (ALJD 5:12-27).

In this case, Respondent and the Union do not have a longstanding collective-bargaining relationship. They are still bargaining for a first contract, and the 2014 health benefits changes were the first such changes made after the certification of the Union as the exclusive collective-bargaining representative of the Doral warehouse operations employees in April 2013.

The Union protested the unilateral announcement of the changes promptly by filing an unfair labor practice charge and by seeking bargaining about this issue in the first bargaining session after it found out about the changes. Respondent refused.

The ALJ properly found and concluded that Respondent announced and implemented changes in health insurance benefits without affording the Union prior notice and an opportunity to bargain in violation of Section 8(a)(1) and (5) of the Act. Therefore, Respondent's Exceptions 3, 5, 6, 7, 8, 10, 11, 12, 13, 14, 16, 17, 18, 19, 21, 22, 23, 24, 25, 26, 29, 30, 31, 32, and 33 should be denied.

E. Respondent's Exceptions 15, 27, and 28 Regarding the ALJ's Evidentiary and Procedural Ruling Regarding the Evidence are Without Merit and Should be Denied

The ALJ is permitted leeway in making evidentiary rulings. Rule 403 of the Federal Rules of Evidence states, in pertinent part: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by … confusion of the issues, … or by the consideration of undue delay, waste of time, or needless presentation of cumulative evidence." Similarly, the Board has long held that, "It is appropriate also for the [judge] to direct the [trial] so that it may be confined to material issues and conducted with all expeditiousness consonant with due process" (footnote omitted). *Indianapolis Glove Co.*, 88 NLRB 986, 987 (1950). Toward that end, "[i]n the conducting of a [trial] the question of whether certain lines of inquiry or responses of witnesses should be curtailed rests within the sound discretion of the judge. The judge's authority to expedite trials must not be exercised to the extent it "limit[s] either party in the full development of its case." *American Life and Accident Insurance Company of Kentucky*, 123 NLRB 529, 530 (1959). Respondent has not shown that the ALJ has limited its ability to develop the record with relevant evidence on relevant issues. The judge received all evidence which is competent, relevant, and material to the issues in the Complaint and properly precluded that which is not. Evidence concerning events which occurred after December 31, 2013 are not relevant to the ALJ's finding and conclusion that Respondent violated Section 8(a)(1) and (5) of the Act when it announced and implemented changes to the bargaining unit employees' health insurance benefits, without notifying the Union and giving the Union an opportunity to bargain. Therefore, Respondent's Exception 15 should be denied.

Assuming, *arguendo*, that there were minor and insubstantial errors committed by the ALJ, it is well established that procedural irregularities are not per se prejudicial. See *NLRB v. Lee Office Equipment*, 572 F.2d 704 (9th Cir. 1978), quoting from *NLRB v. Seine and Line*

Fishermen's Union of San Pedro, 374 F.2d 974, 981 (9th Cir. 1967), cert denied 389 U.S. 913 (1967). There was no dispute as to who Respondent's main negotiator was, i.e. Erik Rodriguez. Therefore, any issues with respect to Juan Nuñez's identification as Rodriguez as the chief negotiator, Nuñez's testimony regarding the meetings held before the 2014 changes were announced; and Counsel for the General Counsel's statement regarding the May 13 bargaining meeting were not prejudicial nor relevant to the ALJ's findings and conclusions of law. Therefore Respondent's Exception 28 should be denied.

Finally, Respondent was not denied due process because Counsel for the General Counsel failed to produce exculpatory material. (RE 27). *Brady v. Maryland*, 373 U.S. 83 (1963), applies to criminal cases, not NLRB administrative proceedings. Therefore, Respondent was not denied due process and Respondent's Exception 27 should be denied.

Respondent was given a full opportunity to be heard on all relevant issues, it was not denied due process of law, it was accorded a full and fair hearing, and the conduct complained of was not prejudicial to it. The exceptions filed in this regard should be denied.

IV. CONCLUSION

Based on the foregoing, the ALJ's conclusions of law, his recommended remedy, Order and Notice to Employees should be affirmed, with the modification to the Order based on the additional remedy sought in Counsel for the General's Counsel's cross-exception, and Respondent's Exceptions should be denied in their entirety.

Dated at Miami, Florida, this 6th day of February, 2015.

Respectfully submitted,

/s/ *Marinelly Maldonado*

Marinelly Maldonado, Counsel for the General Counsel
51 SW 1st Avenue, Suite 1320
Miami, FL 33130
Telephone No. (305) 530-7034
Facsimile No. (305)536-5320
marinelly.maldonado@nlrb.gov

CERTIFICATE OF SERVICE

I hereby certify that Counsel for the General Counsel's Answering Brief to Respondent's Exceptions in the matter of UPS Supply Chain Solutions, Inc., Case 12-CA-113671, was electronically filed with the National Labor Relations Board and served by electronic mail upon the below-listed parties on this 6th day of February, 2015, as follows:

By electronic mail:

Jonathan L. Sulds, Esq.
Greenberg Traurig, LLP
MetLife Building
200 Park Avenue
New York, NY 10166
suldsj@gtlaw.com

Angela Ramson, Esq.
Greenberg Traurig, LLP
Terminus 200, Suite 2500
3333 Piedmont Road NE
Atlanta, GA 30305
ramsona@gtlaw.com

Noah Scott Warman, Esq.
Sugarman & Susskind, PA
100 Miracle Mile, Suite 300
Coral Gables, FL 33134
nwarman@sugarmansusskind.com

/s/ *Marinelly Maldonado*

Marinelly Maldonado
Counsel for the General Counsel
National Labor Relations Board
Miami Resident Office, Region 12
51 S.W. 1st Avenue
Miami, FL 33130
marinelly.maldonado@nlrb.gov